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On the way to a Constitutional Convention for Cyprus

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ABSTRACT

This working paper aims at presenting, discussing and developing the issue of a constitutional convention as a possible means to initiate a democratic process of autonomous constitution making in Cyprus. Autonomous constitution making means opening a process rather than defining a final product at the outset. Accordingly the goal of this paper is not to provide extensive and comprehensive solutions to important issues of the Cyprus' problem in general. Instead the objective is to mention the crucial issues that will need to be discussed by the Constitutional Convention for Cyprus. Moreover, this paper outlines what must be the basic legal principles that guide this process and what could be the different steps towards its implementation.

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1. Introduction

1. The aim of this paper, drafted under the sole responsibility of the Research Centre on Direct Democracy (c2d)¹ after extensive peer review, is to present and to develop the issue of a constitutional convention as a possible means to initiate a democratic process of autonomous constitution making in Cyprus. As an academic working paper, its sole intention is to open a debate among scholars, political actors, members of civil society and citizens in and outside Cyprus.

2. The basic idea of this democratic process is that the people of Cyprus, living up to the basic principles on which the European Union is founded – liberty, democracy, human rights and rule of law – have a fundamental right to recover full sovereignty and to put an end to all legal and factual, international and internal limitations of self-government by adopting, for the first time in history, their own Constitution.

3. Autonomous constitution making means opening a process rather than defining a final product at the outset. A democratic process consisting of several sequences should enable the Greek, the Turkish and other communities in Cyprus, with the joint assistance and under the joint supervision of the EU and the UN, to overcome the present stalemate and to find means and measures that will eventually bring an end to a conflict that has lasted for too long and that threatens European integration, regional stability and international peace.

4. This paper outlines what must be the basic legal principles that guide this process and what could be the different steps towards its implementation.

2. Basic Legal Principles and their Interpretation

5. The process that would allow the Cypriots to finally draft and enact their own Constitution has to be firmly anchored in the basic principles upon which the international community, the European Union and its member states are founded. These principles face serious challenges in the context of the past and current Cyprus conflict.

6. The process of autonomous constitution making is fully consistent with the UN Secretary-General's firm belief "*that the responsibility of finding a solution lies first and foremost with the Cypriots themselves*"².

Principle 1: Legal basis

7. The first basic principle is the rule of law: Any process of autonomous constitution making needs a specific and detailed legal basis, which sets out the principles, defines the actors, indicates the steps and provides for the organizational

¹ Formerly University of Geneva (<http://c2d.unige.ch>), since September 2007 University of Zurich (www.c2d.ch).

² Security Council Resolution 1789 (2007).

and procedural rules. Re-unification cannot take place in a legal and constitutional no-mans-land.

8. In today's Cyprus, this basic principle is not easily satisfied. The main difficulty stems from the fact that neither side of the Cyprus conflict is willing or able to officially recognize the existence of the other, thus barring the treaty solution for creating a legal basis for a constitution making process.

9. Nor seems there to be any possibility that the existing constitutions be amended, separately or jointly, for creating the legal basis for a common constitutional convention. While the 1960 Constitution of the Republic of Cyprus can only be amended with the explicit and unanimous consent of all communities and guarantor powers involved, a consent which as a result of the tragic events of the sixties and the seventies is impossible to reach, any kind of recognition of the "1983 Constitution of the TRNC" by the Greek Cypriot and the international communities would amount to legalization of unlawful occupation. As both constitutions have been more or less imposed on the people of Cyprus by foreign powers, it seems difficult to rely on them for opening a process designed fundamentally to finally realize self-government and sovereignty of that people.

10. It thus becomes apparent that maintaining and simply amending the existing treaties, constitutions and other normative acts cannot create the legal basis for the constitutional convention. As a new paradigm, the Constitutional Convention for Cyprus would need to find and to establish its own legitimacy through a new set of democratically accepted rules.

11. This paper advocates the drafting, under the joint responsibility of the EU and the UN, of a "Charter for a Constitutional Convention in Cyprus" that would contain all substantive and procedural regulations necessary to launch, pursue and conclude the process of adopting a new Constitution for Cyprus through the instrument of a constitutional convention. The Charter would be submitted to the people of Cyprus in a referendum held on the same day in both communities of Cyprus and would require the approval of a double majority of the voters in order to enter into force.

Principle 2: Popular assent

12. The second constitutional principle is democracy: Popular assent is a paramount requirement of a re-unification process. It means that the decisive steps of this process must derive their legitimacy from the people itself. This is what sovereignty of the people is all about.

13. The constitutional convention is by its very essence an instrument of democratic constitution making that has been successfully employed throughout history on all continents. The basic idea is that constitution drafting is not an ordinary matter that can be left to existing governmental bodies, self-appointed agents and foreign experts. Constitution drafting must be integrated in, and not separated from, the democratic political process.

14. A Constitutional Convention for Cyprus, democratically elected or appointed so as to reflect appropriately the will of the voters and the aspirations of civil society of the different communities of the island should have the sole responsibility for drafting a new Constitution for Cyprus.

15. In a divided country like Cyprus, popular assent requires a majority of the voters within each community. The Constitutional Convention must gain the support of the people of Cyprus through separate referendums and elections held simultaneously in both communities of the island.

16. Popular assent is thus a prerequisite for each one of the four decisive momentums of the constitution making process. The people must first approve the Charter creating the legal basis of the process. The people must then elect the Constitutional Convention for Cyprus according to the rules laid down in the Charter. Next, the people must ratify the new Constitution of Cyprus drafted by the Constitutional Convention. Finally the people must elect the state organs – a new Parliament, a new President – provided for by the new Constitution.

Principle 3: Sovereignty

17. The third basic principle is sovereignty. Sovereignty means independence, which is a prerequisite of both EU and UN membership. By claiming and asserting their fundamental right to give themselves their own Constitution, the people of Cyprus have a unique chance to redefine their independence.

18. The continuing presence of Greek and Turkish military forces in Cyprus, the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland and the right of intervention in its internal affairs reserved to Greece, Turkey and Great Britain as the guarantor powers according to the Treaty of Establishment of 16 August 1960, a relic of colonialism which has not been affected by the accession of the Republic of Cyprus to the European Union, constitute severe limitations to the sovereignty of the people of Cyprus that need to be renegotiated on the basis of the new Constitution.

Principle 4: Respect of liberty, democracy, human rights and rule of law

19. Both the process that opens the way for a constitutional convention and the new Constitution of Cyprus that this convention is to bring into life must strictly abide by the principles of liberty, democracy, respect for human rights and the rule of law upon which the EU is founded and which are common to the member states (Article 6 TEU) and indeed to the international community.

20. The present state of affairs in Cyprus is thoroughly inconsistent with these principles. Liberty, democracy, human rights and the rule of law are constantly threatened and seriously violated by the prevailing artificial separation of the people and of the territory of Cyprus into two systems, imposed and maintained by foreign intervention, each of which denying the other's right to existence.

21. The Constitutional Convention for Cyprus has the unique chance and historic responsibility to draft a new Constitution that will hopefully re-unite the people of Cyprus by overcoming the existing territorial, religious and political barriers in full compliance with international human rights and protection of minority standards and with strict respect for cultural and linguistic diversity.

3. Eight Steps and their Interaction

22. Firmly relying on and implementing the foresaid principles, the process of framing a new Constitution for Cyprus consists of a sequence of several steps each of which rests ultimately within the sole responsibility the people of Cyprus and their representatives.

Step 1: The Charter for a Constitutional Convention in Cyprus

23. The Charter for a Constitutional Convention in Cyprus is something like a constitutional act of sovereignty that is designed to put the whole process of autonomous constitution making on firm legal grounds, from beginning to end and throughout all stages.

24. As a political instrument, the Charter represents a paradigmatic link between the present constitutional pattern in Cyprus – divided, diverted and distorted by half a century of mutual ignorance and foreign intervention – and the future constitutional setting that has the aim to re-unite the Turkish Cypriot and the Greek Cypriot communities in full respect of their political, cultural and religious identity. As it puts an end to the first pattern, the Charter breaks the way for the second.

25. As a legal document, the Charter is something like a road map, creating the possibility to put an end to the existing parallel chains of legality within the Greek and Turkish Cypriot communities which have been thoroughly weakened and eroded since their foundation, in order to found a new chain of legality and give rise to a new legitimacy that culminates in the adoption of a new Constitution, the starting point of a new constitutional order. In legal terms, the Charter is nothing else than a normative revolution, made necessary by the deadlock among the existing treaties and basic laws.

26. As a procedural norm, the Charter is required to set forth every single rule relating to and concerning the Constitutional Convention including its composition, election, functioning, organization, tasks and duties, responsibilities, datelines, majorities, quorums and many more. It should not however restrict by any substantive means the sovereign power of constitution making that belongs to the Constitutional Convention. The Charter, in other words, says all that is needed for the Constitutional Convention to exist, to convene, to discuss, to decide and to conclude; it says nothing about the contents of the Constitution that is to be framed by the Convention.

27. The difference between procedure and substance is decisive for answering the question of who is to draft the Charter and how. If the Charter were to contain not

only the former but also the latter or essential parts of it, we would be facing a typical chicken and egg problem: The body that adopts the product should also enact the instrument, meaning that both the Charter and the Constitution would have to be drafted by the Constitutional Convention.

28. Procedural rules are of course by no means neutral. They quite naturally tend to shape and to canalize the substance in way that can be more or less discretely mastered by their author, thus favouring the latter. It must therefore be strictly avoided that the body, which drafts the Charter, has any direct stake in the outset of the constitutional debate that is to follow. This is why the existing political leaderships and administrations in Cyprus, and even less the foreign powers that have dominated the Cyprus conflict since its outbreak – United Kingdom, Greece and Turkey – should not be directly associated with the drafting of the Charter. The Charter is no “Annan Plan B”. It is a recipe that needs to be cooked and not a plate that can be served.

29. One basic rule, of procedural nature but with major substantive implications, must be provided for by the Charter itself, without any possibility of the Convention to change it. If, for any reason and at any stage, the process of autonomous constitution making opened by the Charter should collapse, fail or stumble, the different communities of Cyprus would continue to be bound by the pre-existing constitutional schemes and rules. The safeguard clause is intended to prevent abuse of this process as a means to achieve a goal that is not a product of the latter.

30. It is submitted that the Charter be drafted by an International Expert Panel, convened on the basis of this paper, that it be widely discussed by the international academic community and the public and that it be finally submitted to the political leaderships in Cyprus, the Secretary-General of the United Nations and the President of the European Commission.

Step 2: Referendum on the Charter

31. The political leaderships of the Greek and Turkish Cypriot communities, under the joint auspices of UN and the EU, shall organize a referendum on the Charter for a Constitutional Convention in Cyprus. The referendum should be held on the same day in both communities of Cyprus. A double majority would be required, consisting of a separate majority of the voters of each community, both approving the Charter. The UN and the EU are to supervise jointly and efficiently the referendum for the Charter campaign and the electoral operations and to provide financial assistance.

32. The first question is to decide who shall define the electoral body that is allowed to take part in the referendum for the Charter. The answer is easy. It can only be the Charter itself, as it must set out, in one way or another, the conditions of its own coming into existence.

33. The second question is how to define this electoral body. This time, the answer is far from easy, mainly because of the presence of settlers in the northern part of Cyprus. The alternative seems to be the following:

34. The Charter could leave it to each community to define the electorate as it wishes, in full respect however of international and humanitarian law standards relating to elections. This means that the electoral body that is going to vote in the referendum for the Charter is likely to be composed differently in each community, creating inequalities that might be problematic. This also means that it will be the responsibility of the political leadership of the Turkish Cypriot community to draw a line between the integrated and the non-integrated Turkish settlers and to exclude the latter from the electoral body, according to the provisions of the Geneva Conventions. This also means that members of foreign armed forces in both parts will have no right to vote.

35. Alternatively, the Charter could also define itself in all details the conditions under which voters would be allowed to take part in the referendum for the Charter, attracting so to say this power from the existing political leaderships. The advantage is that voting conditions would be the same in all parts of the territory. But the enforcement of these conditions by authorities that do not necessarily favour them might cause serious practical and political problems.

36. The referendum on the Charter is the turning point of the whole process. If the people in one or in both parts of Cyprus vote No, the concept of a Constitutional Convention has failed. If the voters approve, the Charter comes into legal existence and is hence ready to perform its de-constructing and re-constructing functions with regard to the former and the future constitutional order. Only popular assent can legitimize the break of legality operated by the Charter. A victory of the Yes means that the people of Cyprus are ready for a new start in a new direction.

Step 3: Election of the Constitutional Convention

37. The next step will consist of the election of the Constitutional Convention by the voters of each community, according to rules and procedures to be defined entirely by the Charter. Besides the fact that the election should be held on the same day in both communities and allow the designation of all members of the Constitutional Convention by one single electoral move, a whole series of delicate questions must be answered by the Charter:

38. The Charter would first have to fix the total number of the members of the Constitutional Convention. A figure between 80 and 100 seems to be an appropriate range, permitting a broad representation of the most significant segments of the political entities and civil societies of Cyprus without creating an oversized body.

39. The Charter would then have to decide how many seats would be reserved for the representatives of the Turkish Cypriots living in the TRNC. At first glance, this looks like one of the trickiest questions. Maybe it is not. Be it a 20 – 80, 30 – 70 or a 40 – 60 ratio, each side would have to deal and to compromise with the other because at the end of the day the Constitution will have to be approved by a double majority within both communities. If for instance the majority of representatives of the Greek Cypriot community would systematically impose its views on the minority representing the other side, there would be little hope if any that the voters of the latter would ever approve it. The same of course is true the other way around: If the

Turkish Cypriot minority would dare to play a veto power game in view of its foreseeable voter's opinion, the Greek Cypriot majority could hardly convince its community to abide by such an endeavour. The double majority rule applying to the constitutional referendum has in other words a preventive effect on the deliberations and the decision making process of the Constitutional Convention, forcing each group or party to notice and to take into account the existence, aspirations and fears of the other.

40. The Charter would also have to ensure an appropriate presence in the Constitutional Convention of the traditional Maronite, Armenian and Latin communities.

41. Then there is the delicate question of eligibility. Are all voters, as defined either by each constituency or by the Charter, eligible to the Constitutional Convention? Should an age limit of say 25 be required? May Turkish Cypriots be candidates in the Greek Cypriot community? Could Greek Cypriots run for a mandate within the Turkish Cypriot community? Would it be possible for an emigrated Cypriot, living in the UK or in Greece, to be a candidate and to get elected? Is there to be but one decisive criterion, like residence, citizenship or ethnic origin, or should the three be somehow combined?

42. Incompatibilities are another delicate topic. While it would be excessive to exclude members of parliament of both communities to sit in the Constitutional Convention, the exercise of judicial, governmental and top level administrative functions in either community should be incompatible with a Convention mandate.

43. The Charter must also define the electoral system, which again implies answering a whole set of questions. Should the two main communities be subdivided in smaller multi-member constituencies? Would this be done by the Charter itself or left to each side? Should the proportional representation be combined with a preferential system? What are the rights of the voters? How the seats are distributed among the communities? What quorum is required for participation in the second distribution? What method is used for the distribution of the remaining seats? How are vacancies to be filled? All these, and many more, questions must be addressed.

Step 4: Organizing the Constitutional Convention

44. Once elected, the Constitutional Convention of Cyprus would first have to get organized in order to be able to accomplish its functions efficiently and independently. This again is a crucial point, which the Charter will have to deal with in all detail.

45. Is the Constitutional Convention to be a professional body, meaning that during its existence all members are fully dedicated to their mandate without exercising any other public or private office that could threaten their independence? Or would it be preferable to conceive membership in the Convention as a part-time activity, according to a realistic representation scheme in which each one of the various ethnic, professional, political and religious constituencies would be indirectly

present within the Convention? The answer to this basic question will have important financial consequences as to the appropriate recompense of membership.

46. Where will the Constitutional Convention convene, have its committee and plenary meetings, its administration, its facilities, its formal seat? If it is in Cyprus, which would be preferable for symbolic, practical and financial reasons, where? In a building located in the Greek or Turkish Cypriot community? Could it be alternatively here and there? In the buffer zone? Are the members of the Constitutional Convention to be put under the physical protection of the UN armed forces or of EU officials, at least while sitting, at best all the time, including in their private life? What kind of privileges and immunities should be attached to the mandate? Or would the necessary independence be better protected if the Convention convenes in a neutral place outside Cyprus like Geneva or Oslo?

47. The sovereignty of the Constitutional Convention with regard to the substantive issues implies its autonomy with respect to its internal organization. The Charter should therefore delegate to the Constitutional Convention itself the power to enact an autonomous regulation providing for the latter, including election of the Presidency and the steering committee, formation of committees on selected substantive issues, voting procedures, decision making process, appointing of experts, holding of hearings, communication policy, a.s.o. Some points, such as majority rules and public access to the plenary sessions, should however be tackled by the Charter.

48. Organizing the Constitutional Convention also means to define its institutional relationship with the acting political leaderships of both Cypriot communities. This of course is a highly sensitive question. While the constitutional future of the people of Cyprus must lie exclusively in the hands of the Convention, because this is its only *raison d'être*, the current affairs – political, economic and social; international, national and local – must be taken care of by the political leaderships. The Charter will have to provide for an appropriate system of pragmatic cooperation and separation of powers between the former and the latter.

Step 5: Drafting of a new Constitution by the Constitutional Convention

49. It is the very essence of the Constitutional Convention that it has but one task, which is a huge one: To draft a new Constitution for Cyprus. The new Constitution must be a formal constitution, meaning that it has to provide for specific rules governing its amendment and revision. Nothing that it fixes must be untouchable, meaning that a compromise reached at one point can be modified later, provided that the amending procedure defined by the Constitution be strictly observed. With regard to its substance, the Constitution must to the very least define the composition, competencies and functioning of the main state organs, that is the executive, legislative and judiciary powers. It must provide for appropriate decentralization, define citizenship and the rights and obligations attached to it, protect minorities and human rights, promote sustainable development, insure minimum social protection and much more.

50. The Charter, which is aimed to set out the rules governing the opening and the different stages of the constitution making process, should not otherwise restrict the full liberty of the Constitutional Convention to choose whatever political system it may prefer – presidential, parliamentary or combinations thereof – to find territorial solutions by an appropriate decentralization scheme – in districts, regions, communes or whatever – and to work out schemes and procedures that will be able to effectively protect minority and human rights, in the interests of those who would have the last word: the voters of each community.

51. The only legal limit of constitution framing would be strict compliance with European constitutional principles, international law and human rights standards, as well as EU law. Politically, the outer limit would lie in finding solutions and compromises on government, decentralization and protection of minorities that would have a fair chance of being accepted, at the end of the process, by a majority of the voters of all communities of Cyprus. In that sense, the Constitutional Convention is sovereign, having the sole responsibility for striking the necessary balance among the conflicting interests of its various communities, religions, political parties and segments of civil society. In other words, the Constitutional Convention will both allow and oblige the people of Cyprus to find their own way for solving their constitutional problems.

52. One point that will have to be tackled by the Charter itself is time limits. Constitutional conventions cannot sit eternally. The Constitutional Convention for Cyprus would be given a limited time, say three years, for adopting a first draft of the Constitution. If it fails, it would be automatically dissolved. If the first draft is rejected by the voters in the constitutional referendum, it might be a good idea to give the Convention a second chance to work out, within one year, a second draft. If the latter is again repelled, the process would come to an end.

Step 6: Advice and consent by the political leaderships

53. Elected by the people, the existing political leaderships of both communities cannot be left out of the constitution making process that may eventually put an end to the very existence of the entities they are acting for. While the Constitutional Convention has validly deprived them of the power to directly shape the future status of Cyprus and its communities, they must have their say on the Constitution that redefines this status.

54. This is not to say that the political leaderships would have the right to formally amend the Constitution as it has been drafted by the Convention. Such a power would openly contradict the very reason why the Convention has convened. The wording of the Constitution, the working out of some solutions to the many existing problems and challenges of a re-united Cyprus, the sequencing of new processes that will bring about further progress, are of the sole responsibility of the Constitutional Convention. The political assessment of the Constitution however must be left to the existing political leaderships.

55. Each community, according to its own rules, may provide for appropriate procedures in order to shape and to express the decision on ratification. While

approval by parliament might be possible and perhaps even desirable, a community referendum should be excluded.

56. The political leaderships should not however be given a veto power, enabling them to block the whole process and thus to prevent the draft constitution enacted by the Convention to be put on vote. Such a power would put the acting political leaderships above the democratic process of constitution making and transform the Constitutional Convention into a docile instrument of the former.

57. Whatever opinion the political leaderships may have on the draft constitution, they would have the possibility to address it as an official recommendation to the voters.

Step 7: Constitutional referendum on the new Constitution

58. The new Constitution, as drafted by the Constitutional Convention and with the recommendation of the acting political leaderships, would finally be submitted to a referendum, according to the provisions of the Charter. Historically, the instrument of the constitutional referendum is a by-product of the constitutional convention. Only the people themselves can bring about the legitimacy needed for a new fundamental order.

59. Again, a double majority would be required, that of the separate voters of each community. The double majority requirement will serve as a strong procedural safeguard to ensure that the Constitution will effectively protect the rights of each community in a way that has a chance for being approved by the people of both. This will put the Constitutional Convention under considerable pressure to find and to work out a new constitutional system with institutions, rules and regulations that would be appropriate to solve the Cyprus problem on a fair basis.

60. By approving the Constitution, the people of Cyprus will bring to an end the process that it had opened by ratifying the Charter and pursued with the election of the Constitutional Convention. The Convention will then be dissolved and upon entry into force of the Constitution, the existing administrations will be replaced by the new Unified Republic of Cyprus, or whatever solemn appellation the Convention may have chosen.

Step 8: Election of the new state organs

61. The last stage of the process is the election of Parliament, of the President and/or of whatever state organs the new Constitution provides for.